

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

VICTOR JAMES KAECH,

Plaintiff,

v.

OCWEN LOAN SERVICING, LLC;
MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC; U.S.
BANK NATIONAL ASSOCIATION, AS
TRUSTEE UNDER MORTGAGE
POOLING AND SERVICING
AGREEMENT DATED AS OF AUGUST
1, 2007 MASTR ASSET-BACKED
SECURITIES TRUST 2007 HE-2
MORTGAGE PASS-THROUGH
CERTIFICATES, SERIES 2007-HE2;
FIDELITY NATIONAL TITLE
INSURANCE COMPANY and DOE
DEFENDANTS 1 through 20,

Defendants.

NO. 2:14-cv-00330-SAB

**AMENDED ORDER GRANTING
PLAINTIFF'S MOTION FOR
PRELIMINARY INJUNCTION**

Before the Court is Plaintiff's Motion for Preliminary Injunction to Enjoin the Nonjudicial Foreclosure Sale. ECF No. 14. This Court issued a temporary restraining order ("TRO") on October 9, 2014, that remains in effect until October 23, 2014. ECF No. 4. The TRO enjoined any of the defendants or their representatives from foreclosing on Plaintiff's property until a hearing for

**AMENDED ORDER GRANTING PLAINTIFF'S MOTION
FOR PRELIMINARY INJUNCTION ~ 1**

1 preliminary injunction could be held. A telephonic hearing was held on October
2 22, 2014 at 11:30 a.m.

3 **BACKGROUND**

4 Plaintiff built his home at 1921 Dorner Place in Wenatchee, Washington
5 98801-7351. Plaintiff obtained a mortgage from Decision One in May 2007. By
6 the end of 2008, Plaintiff fell behind on payments to his mortgage servicer, Ocwen
7 Loan Servicing, LLC, (“Ocwen”) and was facing nonjudicial foreclosure. Plaintiff
8 attempted but was unable to obtain a loan modification. After borrowing money
9 from family and friends, Plaintiff was able to pay the arrears and prevent a
10 foreclosure in 2008.

11 In 2009, Plaintiff again fell behind on his payments and received a default
12 notice in October, setting March 2010 for a foreclosure sale. Plaintiff applied for a
13 loan modification and was again denied, however, his application resulted in the
14 2010 foreclosure sale being discontinued.

15 In April 2012, Plaintiff hired lawyers to assist him in obtaining a loan
16 modification. Ocwen advised Plaintiff that he did not qualify for the federal
17 government’s Home Affordable Modification Program (“HAMP”) but was being
18 reviewed for an “in-house” modification. While the loan modification was
19 pending, a new nonjudicial foreclosure sale was set for September 21, 2012—this
20 foreclosure was also discontinued. Plaintiff claims he was sent a loan modification
21 agreement in late October 2012, indicating that his new total monthly payment
22 would be \$1,729.58. Plaintiff indicates he returned the signed agreement, along
23 with the required payment by the stated November 1 due date. A few weeks later,
24 Plaintiff allegedly received a notice that he was delinquent on payments and that
25 his monthly payment was increasing to \$2,119.77. Plaintiff claims that he tried to
26 make regular payments under the terms of the loan modification agreement but
27 was not allowed to do so via Ocwen’s online payment system. In July 2013,
28 Ocwen, on behalf of U.S. Bank, signed an Appointment of Successor Trustee

1 document appointing Fidelity as the foreclosing trustee. Plaintiff disputes the
2 validity of the document. Plaintiff was sent a Notice of Default on October 18,
3 2013 which demanded various fees and expenses be paid in order to prevent
4 foreclosure. Fidelity set the date of October 10, 2014 for the trustee sale. Plaintiff
5 filed his Complaint and Motion for Temporary Restraining Order and/or
6 Preliminary Injunction in Chelan County Superior Court on October 3, 2014.
7 Fidelity removed the case to this Court on October 7, 2014.

8 STANDARD

9 A party seeking a preliminary injunction must show (1) a likeliness to
10 succeed on the merits, (2) a likeliness of irreparable harm absent an injunction, (3)
11 the balance of equities is in its favor, and (4) an injunction is in the public interest.
12 *Earth Island Institute v. Carlton*, 626 F.3d 462, 469 (9th Cir. 2010) (citing *Winter*
13 *v. Natural Res. Def. Council*, 555 U.S. 7 (2008)). Alternatively, a preliminary
14 injunction may be granted with a showing of (1) a likeliness of irreparable harm
15 absent an injunction, (2) the existence of serious questions going to the merits of
16 the case, (3) the balance of hardship tilts sharply toward the plaintiff, and (4) an
17 injunction is in the public interest. *Alliance for the Wild Rockies v. Cottrell*,
18 632 F.3d 1127, 1131-32 (9th Cir. 2011).

19 ANALYSIS

20 Pursuant to Fed. R. Civ. P. 56(a), the Court has authority to issue a
21 preliminary injunction to remain in effect until the resolution of Plaintiff's pending
22 claims if the four elements from the *Winter* or *Cottrell* test are met. Specifically,
23 Plaintiff seeks a prohibitory injunction which "prohibits a party from taking action
24 and preserves the status quo pending a determination of the action on the merits."
25 *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 878
26 (9th Cir. 2009) (internal citation omitted). While a prohibitory injunction is still an
27 "extraordinary remedy that may only be awarded upon a clear showing that the
28 plaintiff is entitled to such relief" it is not as stringent a standard as for a

1 mandatory injunction. *Winter*, 555 U.S. at 22; *Marlyn Nutraceuticals*, 571 F.3d at
2 878. Here, Plaintiff satisfies the requirements for a prohibitory preliminary
3 injunction.

4 First, Plaintiff has shown a likelihood of irreparable harm. Although Plaintiff
5 would retain some remedies at law if his home is subject to a nonjudicial
6 foreclosure sale, these remedies would be inadequate in this case. Real property—
7 particularly one’s home—is unique, and monetary damages alone cannot suffice to
8 make the plaintiff whole if he succeeds on the merits of his case. The likelihood of
9 irreparable harm absent a preliminary injunction is exacerbated where, as here, the
10 homeowner built his own home and has lived in it for thirteen years.

11 Second, Plaintiff has shown—at the very least—that serious questions going
12 to the merits of the case exist. The Court does not purport to forecast the outcome
13 of this case on the merits, however, sufficient questions exist as to the merits to
14 justify a preliminary injunction. Plaintiff alleges that Fidelity lacks standing to
15 foreclose on his home due to defects in assignment and questions regarding who
16 holds the note. Plaintiff also alleges various violations of the Deeds of Trust Act
17 and Consumer Protection Act, particularly regarding various expenses and fees he
18 was charged.

19 There are also questions of whether Ocwen breached its duty of good faith
20 and if it breached the loan modification agreement from October 2012. The loan
21 modification agreement provided for monthly payments of \$1,729.58 that “may
22 adjust periodically.” Plaintiff’s next billing statement jumped to \$2,119.77 due.
23 Defendants suggest the increase in the payment was because of a \$214.64 lien by
24 the City of Wenatchee for garbage and sewer services. This, however, does not
25 come close to accounting for the increase in escrow payments, let alone the
26 various fees and surcharges added to Plaintiff’s second statement. Neither party
27 has fully established its case, nor were they expected to at this stage of the
28 proceedings, but Plaintiff has raised a sufficient likelihood of success on the merits,

1 or at least the existence of serious questions going to the merits, to warrant
2 issuance of a preliminary injunction to preclude a foreclosure sale of his home.

3 Third, the equities tip sharply in Plaintiff's favor. At stake is the house in
4 which Plaintiff built himself and has lived in for thirteen years. On the other hand,
5 Defendants' interests are solely monetary in nature. Although there is nothing
6 wrong with the defendants acting to maximize profits, the equities tip sharply in
7 the Plaintiff's favor in this case.

8 Fourth, the issuance of a preliminary injunction is in the public interest. The
9 Deeds of Trust Act, RCW 61.24 *et seq*, "furtheres three goals: (1) that the
10 nonjudicial foreclosure process should be efficient and inexpensive, (2) that the
11 process should result in interested parties having an adequate opportunity to
12 prevent wrongful foreclosure, and (3) that the process should promote stability of
13 land titles." *Albice v. Premier Mortg. Services of Washington, Inc.*, 174 Wn.2d
14 560, 567 (2012). In this case, the first two of the legislature's stated policies
15 conflict. Allowing the foreclosure sale prior to Plaintiff having his day in court
16 would undoubtedly make the foreclosure process more efficient and inexpensive
17 but would do so at great expense to the homeowner's rights. Additionally, public
18 interest demands this Court reads the Consumer Protection Act as having the
19 purpose of protecting consumers from potentially illegal practices by lenders.
20 Therefore, this Court finds it is in the public interest to prevent the foreclosure
21 process until Plaintiff has an adequate opportunity to present his case.

22 Accordingly, **IT IS HEREBY ORDERED:**

23 1. Plaintiff's Motion for Preliminary Injunction to Enjoin the
24 Nonjudicial Foreclosure sale, ECF No. 14, is **GRANTED**.

25 2. The Court enjoins any attempt to foreclose on any real property of the
26 plaintiff, Victor James Kaech, by any of the defendants or their agents, or any
27 other person having notice of this Order. Specifically, the Court enjoins the sale of
28 the real property located at 1921 Dorner Place, Wenatchee, WA 98801-7351.

**AMENDED ORDER GRANTING PLAINTIFF'S MOTION
FOR PRELIMINARY INJUNCTION ~ 5**

1 3. Pursuant to Federal Rule of Civil Procedure 65(c) and party
2 stipulation, ECF No. 18, Plaintiff shall deposit his monthly payment in the amount
3 of \$1,729.58 to the Court Clerk. The Plaintiff shall make such a payment on the
4 first day of each month. If the Clerk's office is closed on the first day of the
5 month, the payment shall be due on the next day the Clerk's office is open.
6 Plaintiff's first payment shall be made by November 7, 2014. Payment shall be
7 made out to "U.S. District Court." The Clerk's mailing address is:

8 District Court Clerk
9 United States District Court
10 PO Box 1493
11 Spokane, WA 99210

12 4. This preliminary injunction will remain in effect until further Order of
13 this Court.

14 **IT IS SO ORDERED.** The District Court Executive is hereby directed to
15 file this Order and provide copies to counsel.

16 **DATED** this 31st day of October, 2014.



21 *Stanley A. Bastian*

22 Stanley A. Bastian
23 United States District Judge
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